

**DECISION**



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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-209455

**DATE:** June 13, 1983

**MATTER OF:** RAM Enterprises, Inc.

**DIGEST:**

1. Protest that the minimum needs of the agency were not made clear in the solicitation and that the exclusion of the protester's proposal from the competitive range for failure to meet such needs was improper is denied, since the protester was informed during discussions of the agency's actual needs and given the opportunity to revise its proposal accordingly.
2. Where the protester's proposal, after discussions, was reasonably found to be outside of the competitive range, the agency was not required to afford the protester an opportunity to submit a best and final offer even though the firm's price was substantially less than that of the awardee, the only other offeror, since a technically unacceptable proposal is of no value to the agency.
3. An initial proposal need not be excluded from the competitive range simply because the offeror did not return with the proposal all requested documents, if the initial proposal was reasonably susceptible to being made acceptable through the normal revisions that occur during discussions.

RAM Enterprises, Inc. protests the award of a contract for submersible pumps to the Byron Jackson Pump Division of the Borg-Warner Corporation by the Department of the Navy under request for proposals (RFP) No. N00123-82-R-0902. RAM contends that its proposed pump met all requirements and that its proposal, which offered a price substantially lower than that of Byron Jackson, was improperly rejected after discussions without affording it an opportunity to submit a best and final offer. The protester further contends that Byron Jackson's technical proposal was submitted late and should not have been accepted.

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The protest is denied.

The RFP requested technical and cost proposals to furnish submersible pumps with electric motors. The specifications stated that the motor must be oil-filled and equipped with a "mercury seal, or other approved zero leakage type of seal located in the top of the motor to isolate the water from the oil filling housing." The specifications further stated that an offeror desiring to use material other than that named should submit with its proposal a request for approval of any substitutes, giving detailed specifications of the materials proposed as equal to those specified. The RFP stated that a firm fixed price contract would be awarded to the responsive, responsible low offeror whose proposal conformed to all of the required specifications.

#### RAM'S PROPOSAL

On the proposal due date, RAM submitted a proposal consisting of the completed RFP and a cover letter with six pages of technical description of the pump it proposed. The letter stated that its motor was water-filled with a mechanical seal rather than oil-filled with a mercury seal. The letter also stated that while exceptions were taken to many of the requirements, the unit offered was superior to that requested in the solicitation. RAM's proposed price was \$900,757.

The Navy informed RAM by letter that its proposed pump did not meet the specifications, and requested clarification with respect to five different items, four of which were satisfactorily explained in RAM's reply, which also raised the price to \$999,083. The fifth item in the Navy's letter advised that the specifications required a mercury seal in the motor housing, which the Navy noted had been "very effective for intermittent pump non-usage, which may vary from a few days to several months." The Navy further stated that mechanical seals work well with regular use, but have a high failure rate during periods of intermittent use such as experienced while in drydock.

RAM's reply again pointed out that it was proposing a water-filled motor rather than an oil-filled motor. RAM explained that while the introduction of salt water into an

oil-filled motor results in immediate damage and shut-down, a water-filled motor can continue to run until repaired. RAM contended that the supposed greater reliability of mercury seals therefore was not warranted.

The Navy determined that RAM's proposal as revised was still unacceptable because it did not propose a motor with a mercury seal. It therefore eliminated RAM's proposal from the competitive range without seeking a best and final offer from RAM, and ultimately made award to Byron Jackson at a price of \$1,600,000.

RAM contends that as the specifications permitted either a mercury seal or other approved zero leakage seal, the rejection of its proposal because it did not offer a mercury seal was improper. The firm further complains that the intermittent use requirement noted in the Navy's letter requesting clarification was established after receipt of initial offers. RAM also maintains that neither the mercury seal nor any other type of seal is truly zero leakage, and points to an RFP requirement for moisture sensors to detect leakage through the mercury seal as an indication that the Navy recognizes this fact.

Our Office does not independently evaluate technical proposals and make its own determinations as to their acceptability, because the evaluation of such proposals is a matter within the discretion of the procuring agencies, which are responsible for identifying their needs and the best methods of accommodating them. Health Management Systems, B-200775, April 3, 1981, 81-1 CPD 255. The determination to exclude a technical proposal from the competitive range therefore is a matter primarily for administrative discretion, which we will not question unless the excluded firm shows that the agency did not have a reasonable basis for its decision. All Star Dairies, Inc., B-209188, January 31, 1983, 83-1 CPD 107. Our review of the technical evaluations and the decisions to exclude certain firms is limited to ascertaining whether the determinations are unreasonable, arbitrary, or in violation of procurement laws and regulations. Drinkwater Engineering, Inc., B-206368, November 2, 1982, 82-2 CPD 400.

The Navy agrees with RAM that the solicitation did not call exclusively for a mercury seal, and that an approved zero leakage seal is clearly acceptable under the specifications. The Navy contends, however, that RAM's proposed mechanical seal was not acceptable because the Navy's experience with such seals in similar use indicated they were unsatisfactory, and that this reason was conveyed to RAM during the discussions. The Navy states that while mercury seals have withstood the test of approximately 40 years of successful use in corrosive marine environments, mechanical seals in the same environments have been extremely subject to leakage.

In our view, the Navy had reasonable grounds for insisting that a mechanical seal would not meet its minimum needs. The Navy's experience indicated that the degree of reliability offered by a mercury seal was needed, and other than its statement, RAM has presented no empirical or other evidence indicating that mechanical seals have proven to be equally reliable. In connection with its revised proposal and this protest, RAM has simply chosen to insist on the acceptability of the mechanical seal. A protester, however, has the burden to prove its case, and mere disagreement with the agency's opinion on a technical matter does not meet that burden. See Rack Engineering Company, B-208615, March 10, 1983, 83-1 CPD 242. In this respect, the fact that no seal may be truly zero leakage is irrelevant since RAM simply has not shown that a mechanical seal is as reliable as necessary.

Further, the fact that the requirement that the motor be able to operate in an intermittent use situation may not have been clear from the RFP as issued does not invalidate the requirement or establish that RAM's offer was unfairly rejected. The requirement and the reasons RAM's initial offer was unacceptable were related to the firm in the Navy's five-point letter, to which RAM had adequate opportunity to respond with a revised proposal. The fact that an RFP as issued may not have imposed a particular requirement does not preclude an agency from insisting on the requirement during the negotiation process as long as offerors are afforded the opportunity to revise their

proposals to respond to the agency's expressed need. See ADP Network Services, Inc., B-193817, March 7, 1979, 79-1 CPD 163.

RAM contends that as discussions were conducted with it, the proposal had been determined to be within the competitive range with a reasonable chance of being selected for award after discussions. RAM argues that according to Defense Acquisition Regulation (DAR) § 3-805.3 (1976 ed.), written notification at the close of discussions should have been given to the two offerors to submit their best and final offers. The Navy, however, contends that RAM's proposal was never considered to be acceptable, but because there was only one other offeror, it decided to resolve its doubts in favor of conducting discussions with RAM. When RAM continued to offer the mechanical seal, the Navy placed the proposal outside of the competitive range because it was still technically unacceptable. The Navy argues that there was, therefore, no requirement that RAM be given an opportunity to submit best and final offer.

A determination that a proposal is in the competitive range for purposes of discussions does not necessarily mean that the proposal is acceptable as initially submitted, but may indicate only that there is a real possibility that it can be improved without major revisions to the point where it becomes acceptable. Proprietary Computer Systems, Inc., 57 Comp. Gen. 800, 804 (1978), 78-2 CPD 212. Moreover, even though a proposal may initially be found to be within the competitive range, once it becomes clear that it does not belong in the competitive range, it may be excluded without further discussions or allowing the submission of a best and final offer. 52 Comp. Gen. 198, 208 (1972); RDW Systems, Inc., B-204707, July 20, 1982, 82-2 CPD 61. A proposal that is technically unacceptable is of no value to the Government even though its price may be much lower than those in the proposals that are acceptable. Duroyd Manufacturing Company, Inc., B-195762, November 16, 1979, 79-2 CPD 359.

When these principles are applied to the facts described above, we find that the Navy's failure to request a best and final offer from RAM was reasonable. After

the discussions during which RAM gave no indication that it would offer anything other than the mechanical seal, the Navy had no basis for believing that a best and final offer from RAM could result in an acceptable proposal.

BYRON JACKSON'S PROPOSAL

The RFP required offerors to submit technical and cost proposals. Attached to the RFP were a number of pages of technical specifications and drawings, which offerors were required to return whether or not an offer was submitted. Further, the technical specifications required that the proposals contain complete data regarding the proposed units, including sectional drawing and dimensional outlines of the pumps and motors, and performance curves showing guaranteed performance characteristics. The late proposal provision in DAR § 7-2002.4 was incorporated by reference into the RFP.

The initial proposal Byron Jackson submitted on June 30 consisted of a price, the RFP without the technical specifications, a cover letter with a warranty clause, acknowledgement of an amendment, a performance curve, two drawings, and a corporate resolution authorizing the proposal signature. On July 14, at the request of the Navy, Byron Jackson returned the copy of the technical specifications, and stated it had been inadvertently omitted from the initial proposal.

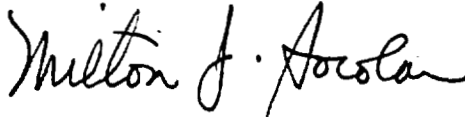
RAM first complained that Byron Jackson's submittal of the specifications two weeks after the proposal due date was a late proposal or modification in its rebuttal to the Navy's report on this protest. As the Navy had not discussed this issue in its report, we requested and received a supplemental report on the matter.

RAM argues that under DAR § 7-2002.4, the July 14 submittal was late and should not have been considered. RAM further contends that Byron Jackson's proposal of June 30 without the July 14 submittal was incomplete because it did not specifically set forth how Byron Jackson proposed to meet the specifications, including the seal requirement.

We think the Navy was not unreasonable in finding Byron Jackson's proposal of June 30 to be sufficient to form the basis for discussions. While proposals in negotiated procurements must ultimately conform to the solicitation, a nonconforming initial proposal need not be rejected if it is reasonably susceptible to being made acceptable through negotiations. See Executone of Redding, Inc., B-199931, February 10, 1981, 81-1 CPD 86. The RFP required the return of a fully executed RFP with certain data and, in responding, Byron Jackson neglected to return only the specifications, which the RFP clearly stated were based on the Byron Jackson pump. Except for the specifications, the RFP did not require anything more than Byron Jackson submitted unless the offeror asked, as did RAM, for approval of substitute materials.

Moreover, while DAR § 7-2002.4 provides that any proposal modification, except one resulting from the contracting officer's request for revised offers, received after the time specified for receipt of initial offers will not be considered except in limited instances, the regulation does not define what a modification is. According to DAR § 3-506(d), the normal revisions of proposals by offerors selected for discussions are not to be considered as late proposals or late modifications to proposals. Since we believe that Byron Jackson properly was included in the competition based on the June 30 submission, and in view of DAR § 3-506(d), we do not consider the July 14 submittal a late modification within the meaning of DAR § 7-2002.4.

Therefore, RAM's protest, both as it pertains to the rejection of its own proposal and the acceptance of Byron Jackson's proposal, is denied.

*for*   
Comptroller General  
of the United States